United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1069

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P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

-against-

VINCENT DeVITO,
Defendant-Appellant.

On Appeal From The United States District Court For The Southern District of New York

Appellant's Brief

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

VINCENT DE VITO,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

The appellant VINCENT DE VITO, appeals from a judgment of conviction rendered in the United States District Court (Thomas P. Griesa) whereby the appellant was convicted after trial before a jury under count 1 of the indictment charging a conspiracy, under 28 U.S.C. 894 (collection of extensions of credit by extortionate means) and the substantive counts of the indictment designated as counts 2, 4, 5 and 7 respectively charging a violation of 21 U.S.C. 894 (a).

As a consequence, the appellant VINCENT DE VITO was sentenced to a one (1) year term of imprisonment on each count, the said sentences to run concurrently with each other.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

A. Were the verdicts supported by the evidence?

B. Should the Court have allowed the government to introduce the grand jury testimony of certain of its witnesses whose testimony at trial was not favorable to the government, said grand jury testimony being presented as substantive evidence?

C. Did the prosecution's summation exceed the limits of fair comment?

STATEMENT OF THE CASE AGAINST THE APPELLANT, VINCENT DE VITO:

The first witness presented by the government was Philip Jackson, who testified as to count 4 of the indictment. On direct testimony he related that in 1970 he was employed by Al's Private Car Service as a driver in the Bronx. He saw the co-defendant Dinino, visit that place during the week giving and collecting money to and from various individuals (20, 21)*. Through a Louis Materasso, he arranged for a loan from Dinino in late 1970 (20, 23, 24). The necessity for a loan was due to Jackson's gambling losses (24). Dinino told Jackson that there were two types of loans he could arrange and Jackson described the types. They were distinguished by the time of payment and amounts (26, 27). After choosing the first type of loan, Dinino loaned Jackson $200.00 and told him that he was to pay $10.00

*( )This refers to the pagination of the appendix submitted by Vincent De Vito.

weekly until he repaid the principal (27, 28). Jackson made the $10.00 payments and asked Dinino to increase the loan to $500.00 and Dinino agreed (29). This was the second loan (29). In the spring of 1971 Jackson asked Dinino for a third loan categorizing that as a second type of loan because of the amount of payments to Dinino (30, 31). Two or three days later Dinino made that loan to him in the amount of $200.00 which was less than Jackson wanted (31, 32). Jackson made sporatic payments asking Dinino for a renewal of the second loan (32, 33). Because of Jackson's defaults in the weekly payments, Jackson had to pay a penalty (33, 34). Jackson also saw a Sidney Shalkin, Tommy Brando, Louis Materasso, Sherman Ronsen and Phil Casisse, who apparently worked at the place or habited the place, also paid Dinino (35).

Having procured two loans from Dinino, Jackson subsequently asked for a third loan but Dinino refused (44). Jackson therefore devised a ruse by asking Ronnie Levine, another driver, to borrow $500.00 from Dinino and give the proceeds of that loan to Jackson who would assume the payments. This device was consumated and Ronsen was successful in procuring the loan and thereafter giving the $500.00 proceeds to Jackson (45, 46).

Finally, having defaulted to the extent of $1800.00, Jackson told Dinino that he needed time to make the payment (46, 47). Dinino accommodated Jackson extending his time for two (2) weeks (47). Nevertheless Jackson still couldn't pay (52-54).

Meanwhile Jackson was getting advice from Gamblers Anonymous. He finally told **Dinino** he couldn't pay the principal of $1800.00 in the weekly payments. Jackson then also confessed to the device he and Levine perpetrated to get the $500.00 loan from **Dinino.** It will be recalled that the fruits of that loan were given to Jackson by Levine (55, 56). **Dinino** thereupon became irate and told Jackson he would look to Levine for the payments of that loan (56, 57).

After **Dinino** spoke to Levine, Jackson again spoke to **Dinino** telling him that he would pay Levine's loan and that if **Dininc** didn't accept Jackson's terms, he wouldn't get paid at all (58, 59). Jackson further told **Dininc** "...that's the way it's going to be...and if he didn't like it..." he wouldn't be paid. **Dinino** told him that "...for two cents I'll bust your balls right here." (59). Jackson and Denino argued further and ultimately **Dinino** left the place (59).

It next appeared that Jackson was betting with **Dinino** and owed him money on wagers (60, 61).

Jackson testified he was frightened (61). Eventually Jackson and **Dinino** compromised and Jackson made $100.00 payments to **Dinino** for three (3) months (61, 62). Then at Jackson's request, **Dinino** agreed to accept $10.00 weekly (62, 63). This

continued to the summer of 1973 (63).

According to Jackson, Dininc told Jackson that for a period of three or four weeks a person named Louie would make the collections (64). Later, Louie did appear and collected money from other persons in the place (65). There next arose the occasion when Louie came to collect from Sidney Shalkin who was not there for a week. Louie complained that he was annoyed looking for Shalkin. Jackson asked Louie why he acted so "tough" and Louie thereupon displayed a gun, telling Jackson that for two cents he would blow his brains out (66, 67).

In the late summer of 1973 Jackson stopped making payments (67).

On cross examination Jackson testified that he asked Dinino for the loan (87). That he didn't pay the loan (87). On further cross examination Jackson related a history of borrowing from his relatives and persons other than Dinino (100, 101). He also was divorced (102, 103).

When Jackson was initially visited by federal agents he never told tham about DeVito (104). The agents mentioned DeVitc (105, 106). No notes were taken by the agents when they conversed with Jackson at thi[illegible]erview (106). Jackson also stated that Dinino told him a[illegible] others that DeVito was his partner (108). Yet before the grand jury Jackson said that DeVito said he was Dinino's partner (110). He never described DeVito to the agents or gave them DeVito's last name (115).

Sidney Shalkin next testified for the government in regard to count 5 of the indictment. On direct examination he related that in 1971 he was employed at Al's Car Service (119, 120). He knew and identified **Dinino**, having met him in 1972 (120, 121). He borrowed $200.00 from **Dinino** (121, 122). He was to repay the loan by payments of $25.00 for twelve (12) weeks. He made six or seven payments to **Dinino** (122). Due to an illness he thereafter defaulted (122, 123).

He then testified that:

> "...I believe, and there was a remark that I might get a punch in the nose." (124).

Thereafter he transacted two or three renegotiated loans from **Dinino** (124). He made payments on these loans to **Dinino** (124). Asked by the government whether he made any payments to anyone else, he replied he didn't remember "too well" and that he thought he made a payment to another person named Vincent (125). He also believed that DeVito was in the courtroom (125).

He ultimately identified the appellant, DeVito (126). However he couldn't recall whether he paid the appellant after the threat (126). He described a renegotiated loan as amounting to $60.00 bringing up the total loan to $200.00. This was paid in full (126-128).

On cross examination he admitted he never told the agents about the threat (130, 131). The agents did make notes (137, 138).

Nor did he believe that the agents asked him about the appellant DeVito (138). He didn't know the appellant DeVito by his last name nor that he had any "connection" (139). He only saw the appellant DeVito once at the place of employment (140).

Samuel Herskowitz testified that he formerly worked for Al's Taxi (222). He made a courtroom identification of Dinino explaining that he met him in 1965 when he worked for another car service (223, 224). He asked Dinino for a $100.00 loan and Dinino agreed telling him that the charge would be $15.00 (224). He made eight payments and got another loan on the same terms as the former one (225). In 1968 he successfully negotiated another loan from Dinino. All the loans were repaid (226). In late 1969 he met Dinino while working at Al's Taxi. He asked him for a $500.00 loan and Dinino gave him the terms of repayment. After making five (5) payments he borrowed another $200.00 owing $600.00 in all (227, 228). He then changed his employment (228). He drove 15 miles to pay Dinino. Due to an accident which his wife sustained, he stopped making payments (229). He told Dinino about this and Dinino told him "fine". However Dinino also told him that he would have to make $10.00 weekly payments as interest (229, 230). He made the payments until he got sick and couldn't work for three months (230, 231). During his illness he visited the car service and met Dinino who grabbed him by the arm and angrily asked for the monies he owed. The witness told Dinino that he made sufficient payments, telling Dinino he was ill.

Dinino calmed down and agreed to wait until the witness returned to work (231). Finally after resuming employment, the witness repaid the loans in full (232).

On cross examination he admitted he had a friendly relationship with Dinino (234, 235). He was not afraid of Dinino when he was transacting with him (237). On October 10, 1973 he was interviewed by agents (237). He identified the defendants from pictures displayed to him by the agents (238). Introduced as the appellant's Exhibit C was a statement of Herskowitz given to the agents when he was interviewed by them (240). That statement had no mention of DeVito or pictures (240, 241).

Ronald Levine next testified in support of the government's case as to count 2 of the indictment. In late 1970 he was employed at Al's Taxi as a driver (245). He borrowed money from the appellants (245, 246, 248). He also procured a loan from somebody else (248, 249).

He described the $500.00 loan he received from Dinino to benefit Jackson (250). He made some payments on that and defaulted. He told of his predicament to "Phil" (this evidently refers to Jackson the prior witness). He related that that loan was really in behalf of Jackson (250). He ultimately left Al's Taxi and went to work for another automobile service named Carter Cab (251). He also worked for a restaurant (252).

Later he met Dinino and the latter told Levine that Jackson told him about the device of getting the loan to benefit Jackson and Dinino stated that Levine would have to make the payments on that loan (253). Then Jackson and Dinino argued. Levine described the argument as Dinino telling Jackson to stop shouting or he would kick him (253). The subject of the argument was about who was to pay the loan Levine or Jackson (254). He felt uneasy then because of the argument and described his feeling as his uneasiness testifying at trial (254). He felt uneasy because of the argument (254). He next borrowed $300.00 from DeVito who told him the terms of repayment (254, 255). He described DeVito as being a "perfect gentleman" (255). He made payments on the loan given by DeVito (255). Later DeVito arranged with a person named Norman Ralsky to take over the collection of a loan that Ralsky advanced to Levine (257, 258). Levine made payments to DeVito (260, 261). After he was fully paid up Dinino arranged another loan for him in 1972 (261, 262, 264).

Further describing his relationship with Dinino, Levine related that he brought his car to Dinino's service station for repairs and got a credit from him for $275.00 which was the cost thereof (266). Questioned about the alteration between Jackson and Denino, Levine testified he felt a little uneasy (279).

He was then confronted with his grand jury testimony which related to the trick that Jackson perpetrated (280, 281). He testified he was frightened (281). His trial testimony was that Jackson was angry and was shouting (282). Confronted with his grand jury testimony, that disclosed that he testified that Jackson and Dinino were shouting at each other and a third party settled the argument (282). His grand jury testimony also disclosed that Dinino said he would kick Jackson (283). That Jackson looked "angry and scared" (283).

Levine also wagered with Dinino and on one occasion he couldn't pay a gambling loss and Dinino insisted on being paid within one week (288). In regard to the gambling debt, his grand jury testimony related that he was threatened on one occasion when he didn't pay the gambling debt (290). His grand jury testimony also disclosed that he was "frightened" (291). That he was afraid of being assaulted (291).

However he told the trial jury that when he testified before the grand jury he was under pressure from the U.S. Attorney (291). He also borrowed money to repay Dinino (291, 292).

On cross examination Levine testified that Dinino never threatened him (294). That as a matter of fact he was friendly with Dinino (294). That he fabricated to the FBI by telling them he didn't know defendants or Kalsky (298). He did so because he liked the appellants (298). Moreover, he was frightened when interviewed by the U.S. Attorney who informed

him that he could be a hostile or a friendly witness (299). The language used by Dinino was common parlance and meaningless (300). Further the appellant DeVito was not a violent person and that the defendants helped him (302, 303).

Philip Cassese testified in regard to the 7th count of the indictment (203). On direct examination he told the jury that in 1970 he was employed by Carter Cab (203). He worked until 1973 when he became ill suffering from a "mental breakdown" (204). He identified Dinino (204).

He related that he borrowed money from Dinino because he could not get a loan from a bank (205). However he couldn't recall the period of time that he took loans from Dinino (205).

The witness eventually suffered a nervous breakdown and in 1972 he was under the care of a psychiatrist (207). He was then confronted with his grand jury testimony by the prosecutor and at this juncture stated that he couldn't remember the testimony he gave to the grand jury (207, 208, 214, 215). At any rate he did testify he borrowed from Dinino (216). He also added that Dinino helped him and the loan was $500.00 (217). In consideration of a loan he gave Dinino extra money for his generosity (217, 218). However he could not remember making any payments to another person. He made ten repayments to Denino (311). Payments given to Dinino included interest (312, 313, 314).

This was in appreciation for the loan (314). In his grand jury testimony he testified that he paid an additional amount if he missed a payment (317, 318). He couldn't recall that at trial (318). He also made a payment to DeVito (323, 324).

He was again confronted with his grand jury testimony and he stated that DeVito once slapped him because he, Cassese, was offensive to him. This witness told DeVito that he thought that he fully paid the loan to Dinino (327, 328). DeVito disagreed and the witness lost his temper (328). He was then confronted with his grand jury testimony. That testimony disclosed that he testified that his argument with DeVito was a misunderstanding and that he was slapped by DeVito (329). However he also testified that he would have repaid the loan even if he weren't slapped (330).

He was then cross examined as to the slap. He testified before the trial jury that he provoked the slap (334, 335). He explained that he was quick tempered (335). He was called to the U.S. Attorney's office when he was receiving medical care; he suffered from a severe case of depression and a nervous breakdown (336, 337). When interviewed by the federal authorities he told them he was not victimized by the appellants nor was he ever threatened by them (351, 352). Further, that he was never coerced into making payments (352, 353). He disclaimed that the fight with DeVito was not to induce him to make payments (355). He told the grand jury that he wouldn't borrow from the

appellants if he felt that they would use coercion to recover the loans (356-358). He also told the grand jury that neither he nor his family were ever threatened (358, 359).

Over the appellant's objection there was then put into evidence other grand jury testimony of Cassese (361, 362). That grand jury testimony in its entirety is spread out on page 364 and was read to the jury.

POINT I:

THE EVIDENCE WAS INSUFFICIENT:

During the trial the Court commented in part on pages 148 and 149 of the appendix:

> "The Court: When you have a situation and Jackson comes in and testifies that **Dinino** says 'I don't want to hear any more stories. I got to get paid', but then he composes the debt...and he agrees to accept $10.00 a week where is the extortion?"
>
> "I mean that I am seriously considering whether that could possibly let any claim about Jackson go to the jury. Jackson could come in and testify...that he was afraid, but Jackson was a pretty muscley guy on the stand. The upshot of it all is that **Dinino** caved ..." (148)
>
> "The Court: Extortion is a serious crime, and you have to have a case. As far as I'm concerned, I will tell you right now that I do not think you have a case on Jackson. To convict a guy for extortion you have to prove beyond a reasonable doubt something besides the kind of give and take among grown, rather rough men ..."
>
> **"This was not the lobby of Morgan Guarantee..." (149)**

As the trial progressed the Court stated as follows:

> "The Court: I will tell you that I have very serious doubts about this. Now, I think there may have been things that went on here but these people are not willing to talk about, but a jury cannot base that on a finding of guilt under a reasonable doubt. I cannot send the case to the jury on that basis. ..." (276)

In that paragraph the Court did discuss specifically the testimony of one Penker. As to **Penker** the jury exonerated the appellants by acquitting them of count 6 which involved **Penker.**

18 U.S.C. 894(a) provides:

> "Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the non-payment thereof, shall be fined..."

18 U.S.C. 891 which defines the various expressions used in the statute, provides in subdivision (7) thereof that:

> "An extortionate means is any means which involved the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person."

The essence of the statute and the charges against the appellant was the use of extortionate means to collect the debts or to punish the debtors for the non-payment.

It would seem the statute is not concerned with mere harassment or even an assault unrelated to the extension of credit.

In regard to counts 2 and 4 involving Jackson and Levine, the evidence is clear that Dinino was the victim of Jackson's chicanery in getting Levine to borrow money for Jackson the ruse being based on Jackson's lack of credit at that time. It is put that the threat to Jackson was occasioned by this and not to collect a debt by extortionate means or to punish Jackson or Levine for non-payment. As to Levine, his testimony at trial exonerated the appellants.

In regard to Casesse, (5th count), he was a mental case. Nevertheless, it is put that he did not implicate the appellant DeVito. His grand jury testimony revealed that the slap that the appellant DeVito allegedly inflicted upon him was the result of a misunderstanding (329, 330, 335). Even when pressed before the grand jury (this of course was an ex parte proceeding) as to whether the slap was motivated by the desire to collect the debt, Casesse replied:

> "Q. Did you give Vinny the amount of money that you owed John at that time?
>
> "A. I did.
>
> "Q. And this was in response to the slapping?
>
> "A. Well, like I say, it was a misunderstanding. I felt that I had made that payment to John.
>
> "Q. Right.
>
> "A. And Vinny disagreed with me.
>
> "Q. And he slapped you?
>
> "A. So I -- so I without thought said I ain't gonna pay.
>
> "Q. And Mr. DeVito known to you as Vinny slapped you in the face?
>
> "A. That might have been the reason why." (330).

Furthermore, Casesse told the grand jury he wouldn't have borrowed from Dinino if collection would be exacted by force (375, 376). Later on upon further questioning by the government attorney before the grand jury Casesse stated that:

> "Q. What I want to ask you is whether the slapping incident that you testified to before this grand jury changed your opinion of loansharks.
>
> "A. No, it didn't.
>
> "Q. It did not?
>
> "A. No. The slapping was a misunderstanding. I might have said something to infuriate this particular person, sort of a personal offensive remark.
>
> "Q. Well you didn't -- did that in fact occur?
>
> "A. I did yes. I personally offended him.
>
> "Q. By telling him that you, that --
>
> "A. That I wouldn't pay him.
>
> "Q. That you already paid the loan and you wouldn't pay?
>
> "A. That I wouldn't pay any more. I personally offended the man. I was never threatened." (377)

Adverting to 18 U.S.C. 891(7) extortionate means is defined as follows:

> "(7) An extortionate means is any means which involves the use,or an express or implied threat of use, of violence or other criminal means to cause harm to the person, reputation or property of the person."

18 U.S.C. 894a, the statute underlying the indictment herein, provides that:

> "Collections of Extension of Credit by Extortionate Means - (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the non-payment thereof..."

It is submitted that the "extortionate means" must be related to collect the extension of credit. "Misunderstandings" resulting in imprecations, threats or even a slap in the face detached from the purpose of collection, and arising from subjective causes on the part of the actor, are not within the statute. Whatever the lending activities of the lender, such a situated person may be aroused by the attitude or behavior of the borrower as such, independent of a mere desire to collect. **It is submitted it is not evidence of extortion where a lender acts coercively but the borrower would pay the money anyway, irrespective of the coercion.**

Insofar as this particular statute is involved the exaction of interest or other benefits from a basic loan which may be in violation of the state law, is not a violation of this statute. The Court below correctly ruled on this by saying in an earlier phase of the case:

> "There may have been a crime or wrongdoing by engaging in this kind of conduct, but that is not under the law I am worried about. There may be a problem under state law. Maybe the state should not or does not permit people to loan under these terms and circumstances. I have no idea. But I

am dealing with an extortion statute..." (149)

Consequently, the collection of the interest or bonus by the appellants was legal in the federal domain. The vice that Congress sought to obliterate was the use of the extortionate means to collect. As stated in Wharton's Criminal Law, Volume 3, page 795:

> "To constitute extortion by a private person,..., there must be an intent to extort money or other thing of value at the time of making the threat..."

It is submitted that there was no necessity to "extort" the repayment of the loans or interest in this case. Jackson and Levine devised a trick to get a loan and this, it is put, may have stimulated Dinino. But this money would have been repaid anyway. Casesse's testimony showed he would have repaid it, with or without coercion, and in his testimony he disclaimed that he would have negotiated loans from lenders who would use extortion to collect.

Shalkin's testimony is to the same effect. There was no showing that his belief that he would get a"punch in the nose" was a motivating factor in repaying the loan. We cite these instances merely to show that there was no evidence in this case that the statute in question was breached. As stated in Wharton'sCriminal Law and Procedure, Volume 3, at page 798:

> "The gist of the unlawful act comdemned by the Anti-Rackerteeting Statute is extortion, which involves a state of mind as an element of the offense under the statute, and unless there is some form of compulsion, either physical or through fear, there is no crime under the statute, a payment of money voluntarily and of one's own initiative not constituting a violation of the statute."

The statute under consideration in that text is 18 U.S.C. 1951 (b)(2).

In regard to count 5 of the indictment, the government relied on Shalkin, (119). It will be recalled that Shalkin testified that he spoke to Dinino and that "there was a remark" about "a punch in the nose", (126). But whether this "remark" was made before or after the payments that were due Dinino, this witness couldn't recall (126). Consequently there is a reasonable doubt as to whether the extortionate means were utilized to collect.

This brings us to the introduction of the grand jury testimony as to Casesse and Levine. While the trial jury was deliberating it interrupted itself and asked for a re-reading of Levine's grand jury testimony. The following transpired:

> "The Court: We have a note, I will just read it into the record, received about 4:25 P.M.: 'We would like to cancel Mr. Levine's direct testimony but would like his grand jury testimony admitted as evidence. No further request at this time for Jackson.'"

The Court then ruled that it would grant the request and that the jury was just to be given the grand jury testimony, "no surrounding questions or colloquy". Objection was taken by the defense (569). Rule 801(d)(1) of the newly adopted Federal Rules of Evidence in its relevant part states:

> "Statements Which are Not Hearsay. - A statement is not hearsay if - (1) prior statement by witness. - The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath...at a trial, hearing or other proceeding,..."

By allowing the jury to just have the grand jury testimony of Levine, the appellant it is submitted was denied the right of confrontation and/or the denial of due process of law guaranteed by the 5th Amendment to the Federal Constitution. Confrontation of course is guaranteed by the 6th Amendment to the Federal Constitution. This claim is based on the fact that there wasn't any contemporaneous cross examination of Levine when he was before the grand jury. Since the trial jury did "cancel" Levine's trial testimony garnered by the prosecution, the jury had testimony not tested by cross examination and therefore convicted the appellant solely on the grand jury testimony. Counsel recognizes that the 6th Amendment in the context of the introduction of prior statements by a witness does not guarantee that there be contemporaneous cross examination at the time the statement is made. However it seems that Rule

801 (d)(1) should not have been applied here. For as stated in Weinstein's Evidence, Volume 4, page 801-73:

> "It is doubtful, however, that in any but the most unusual case, a prior inconsistent statement alone will suffice to support a conviction since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone."

In the same text, at page 801-76 it is stated:

> "(6) The fact that the prior statement is admitted and given substantive effect does not mean that it will suffice as the sole basis for a conviction. The question of the sufficiency of the evidence remains, 'for the due process clause of the fourteenth amendment may require a minimal standard of evidentiary support to sustain a conviction'."

The last statement of course is based on California v. Green, 399 U.S. 149.

Furthermore, there is not one scintilla of evidence in this case that the government's witnesses were at any time coerced by the appellants, either of them, or both of them. It is p[illegible] the fact that the government did not get the testimony it wanted, did not warrant the use of grand jury testimony in this case to make a case against the appellants.

To sustain the convictions in this case, would be to grant a license to the government to use the grand jury not as a body standing as a bulwaric between the government and the individual, but as a body utilized to prepare for trial.

Furthermore, it is suggested that it was a misuse of discretion if the Court below had discretion, to allow that grand jury testimony to be reheard by the jury. As was stated in 23 A. Corpus Juris Secundum Section 1377, at page 1107-1108:

> "If the trial judge believes that restating part of the testimony would lend it undue prominence, he may refuse the request of the jurors to have it read, or, if he does permit it to be read, may properly caution the jury not to impart undue importance to the portion read..."

See also the American Bar Association Project on Standards for Criminal Justice: Standards Relating to The Administration of Criminal Justice, page 331, Section 5.2(b).

Furthermore, even if the grand jury testimony hereinabove described was relevant, under Rule 403 relevant evidence can be "excluded, if its probative value is substantially outweighed by the danger of unfair prejudice,...". Weinstein's Evidence, supra, Volume I, page 403-7, paragraph 403(01) recognizes that:

> "Rule 403 recognizes that relevancy is not always enough. There may remain the question is its value worth what it costs? Will the search for truth be helped or hindered by the interjection of distracting, confusing or emotionally charged evidence?..." (Internal quotations omitted).

In regard to "Louie" who told Jackson he was looking for Shalkin and who grandished a gun in front of Jackson, it is put that "Louie" never testified at trial; that what Louie stated was hearsay and Shalkin never testified he even saw "Louie". Most important there is no showing and no proof that "Louie's" actions were solicited, commanded, caused or joined in by the appellant.

Similarly, in the instances when Dinino was characterized as acting so as to enforce collection, there was no proof whatsoever that the appellant, De Vito, knowingly participated in the action or that DeVito shared any intent with Dinino or planned, conspired or agreed with Denino that the collection would be enforced by extortionate means, see 18 U.S.C. 894 which provides for accessorial liability where an accused "participates in any way, or conspires to do so," in violation of the statute.

In regard to the conspiracy charge, there was a complete absence of proof that the conspiracy was based on Section 894 a of 18 U.S.C. In other words, there was no showing that the specific purpose of the conspiracy was the collection of debts by extortionate means. There was no proof that the appellants joined and agreed to exercise an extortionate means to collect the debts. The issues were not that the appellants were "partners" in the lending business. If they were, that business insofar as the federal jurisdiction is concerned, was not a federal crime. See U.S. v. Gallishaw, 428 F. 2d 760, (Cir. 2d, 1970).

As was held in Anderson v. U.S., 417 U.S. 211 (1974), at pages 223, 224:

"...It is established that since the gravamen of the offense under Section 241 is conspiracy, the prosecution may show the offender acted with a specific intent to interfere with the federal...in question... Moreover, we scrutinize the record for evidence of such intent with special care in a conspiracy case for, as we have indicated in the related context, charges of conspiracy are not to be made by piling inference upon inference, thus fashioning a dragnet to draw in all substantive crimes..." (Internal quotations and citations omitted).

In U.S. v. Dickerson, 508 F. 2d 1216 (Cir. 2d 1975), it was stated on page 1217 that:

"...Ordinarily, a defendant cannot be convicted of a crime unless he personally participated in its commission. Such participation may take the limited form of aiding and abetting..., but even then it must be proved that the defendant consciously assisted the commission of a specific crime in some active way..."

POINT II:

THE SUMMATION BY THE PROSECUTOR BEFORE THE JURY WAS IMPROPER.

Following the new practice, the prosecutor made the initial summation to the jury. At the initial outset he pointed out to the jury that the defense raised a "smokescreen". Objection to that was taken (450), with the Court asking the defense to let the prosecutor proceed. Furthermore counsel had to apologize for making objections during the summation (450).

On page 448 the U. S. Attorney asked the jury "What is the controversy?" (449). On page 450 again he pointed out that

there was no "controversy".

On page 451 of the appendix the U. S. Attorney then informed the jury that if the witnesses who testified were afraid the jury would know why (451). Application was made for a mistrial and objection was noted and the Court stated it would "appreciate" if counsel remained seated unless it was absolutely "imperative" to object (451). The Court stated that counsel would have the right to render their summations "uninterrupted" (451). On page 459 of the appendix the U. S. Attorney informed the jury there was no "controversy" as to a witness (459).

Finally in the prosecutor's last summation, he relied upon the use of a foreign word. That foreign word was translated by the prosecutor as meaning arrogance (502). In regard to the latter, it is submitted that this was an appeal possibly to ethnic partiality in regard to some or all members of the jury. It has no place in a summation.

It is expected that counsel would talk English to a jury and not appeal to demagogy.

In regard to government counsel stating there was no "controversy" it is submitted this related to the fact that the appellants did not testify and deny the testimony. This is a comment on the appellants' right to remain silent during a trial.

Nor was there any proof at this trial that the witnesses were intimidated by the appellants so as to stifle their testimony. This was arguing evidence outside the record. It is suggested that the summation by the prosecutor should mandate a reversal in this case on the authority of U.S. v. Burse, March 18, 1976, Court of Appeals, Second Circuit, Slip Opinion at page 2507, 2511-2514.

Other prejudice is claimed where the Court admonished counsel not to interrupt the prosecutor's summation. Firstly it is suggested that counsel were absolutely obligated to "interrupt" the prosecutor's summation as required by U.S. v. Indiviglio, 352 F. 2d 276 (Cir. 2d, 1965).

Secondly, the Court by making this known in the presence of the jury may have impressed the jury that counsel were acting improperly, interferring with the jury's right to hear the summation, and this may have adversely affected the appellants. The attributed wrongful conduct of appellants' counsel may have been transferred to the appellants. Furthermore, this was also an interference with the appellants' right to be represented by competent counsel as required by the 6th Amendment to the Federal Constitution.

POINT III:

THE APPELLANT ADOPTS SUCH POINTS AND ARGUMENTS OF THE OTHER APPELLANTS WHICH MIGHT BE APPLICABLE TO THIS APPEAL TAKEN BY THE ABOVE NAMED APPELLANT: RULE 28(i) FEDERAL RULES OF APPELLATE PROCEDURE.

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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Attorney for Appellant
VINCENT DE VITO

ARNOLD E. WALLACH
Of Counsel on the Brief

PELUSO USA v. DeVito

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 28[illegible] Richmond Avenue, Staten Island, N.Y. 10302. That on the 23 day of March 1976 deponent served the within Brief upon:

U.S. Atty., Southern Dist. of NY

attorney(s) for
Appellee

in this action, at
1 St. Andrews Pl.
New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 23
day of March, 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976